Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-638

JAMES L. TRAINOR, Director, Illinois Department of Public Aid,

Petitioner,

vs.

SYLVIA WILSON, individually and on behalf of her unborn child, and on behalf of all others similarly situated,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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JAMES L. TRAINOR, Director, Illinois Department of Public Aid,

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SYLVIA WILSON, individually and on behalf of her unborn child, and on behalf of all others similarly situated,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JAMES L. TRAINOR, Director, Illinois Department of Public Aid, respectfully prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered on July 31, 1975.

OPINION BELOW

The order of the Circuit Court is unpublished, and is included herein as Appendix C.

JURISDICTION

The order of the Seventh Circuit vacating and denying costs to petitioner was entered July 31, 1975. Petition for rehearing en banc was denied on September 10, 1975.

The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1) and § 2106.

QUESTION PRESENTED

Whether costs previously awarded to prevailing party on appeal may thereafter be summarily vacated and denied without findings or a statement of reasons for the reversal, and without an adequate and sufficient reason existing at law.

STATUTES INVOLVED

Rule 39, Federal Rules of Appellate Procedure:

> "(a) *To whom allowed.* Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise

> ordered; if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court."

Title 28 U.S.C. § 1915(e):

> "Proceedings in forma pauperis
>
> • • •
>
> (e) Judgement may be rendered for costs at the conclusion of the suit as in other cases. . . ."

STATEMENT OF THE CASE

On March 31, 1975, the Supreme Court granted petitioner's original petition for Certiorari, vacated judgment and remanded to the Seventh Circuit. (420 U.S. 999, 95 S. Ct. 1440) On July 11, 1975, the Seventh Circuit allowed costs in favor of petitioner (unpublished per curiam order included herein as Appendix A) and remanded to the District Court. (519 F. 2d 1406)

On July 21, 1975, respondent filed a motion to vacate the judgment with respect to costs. (included herein as Appendix B) Petitioner filed detailed written objections to the motion.

On July 31, 1975, Circuit Judge Luther M. Swygert entered a minute order striking that portion of the order of July 11, 1975 awarding costs to petitioner, and summarily denying costs. (unpublished order included herein as Exhibit C)

Petitioner filed a motion to vacate the order of July 31, 1975 and for review by the entire court, renewing and setting forth in greater detail his previous objections. (included herein as Exhibit D) This motion was summarily denied on September 10, 1975. (included herein as Exhibit E)

This is an appeal from the order of the Seventh Circuit summarily vacating and denying costs previously awarded to the prevailing party on apepal, without findings or a statement of reasons for the reversal and without an adequate or sufficient reason existing at law.

REASONS FOR GRANTING THE WRIT

I.

THE ORDER OF THE SEVENTH CIRCUIT IS IN CONFLICT WITH ITS OWN ESTABLISHED PRACTICE.

On remand from the Supreme Court, the Seventh Circuit ordered that costs be taxed in favor of petitioner herein. (Appendix A)

This was proper and in accord with Rule 39 F.R.A.P. as the position originally urged by petitioner in the District Court (358 F. Supp. 1147) had prevailed in the Supreme Court (420 U.S. ——, 95 S. Ct. 1180) despite prolonged and unrelenting opposition and procedural obstructions interposed by respondent throughout every phase of the appeal: e.g., opposition to Stay pending appeal, Brief, filed June 27, 1973 and Motion for Reconsideration, filed July 19, 1973; opposition to Recall and Stay pending appeal, Motion filed May 23, 1974 and Response filed June 3, 1974; opposition to Stay of Judgment pending review on Certiorari, Memo filed June 17, 1974, and Motion to Full Court to Vacate Stay, filed June 21, 1974, docketed in the Supreme Court under A-1212; opposition to Remand to the District Court, Motion filed May 5, 1975.

The question of disallowing costs to the prevailing party was most recently decided by the Seventh Circuit in *Popeil Brothers, Inc.* v. *Schick Electric, Inc.*, 516 F. 2d 772 (CA 7, 1975). The court initially noted that:

> "The most significant issue presented by this appeal is whether the district court abused its discretion under Rule 54(d) of the Federal Rules of Civil Procedure by setting aside the taxing of costs in favor of the prevailing party. . . ." (p. 773)

The language of Rule 54(d) F.R.C.P. is almost identical to Rule 39(a) F.R.A.P.

In reviewing the history of award of costs, the court observed that:

> "Prior to the promulgation of the Federal Rules of Civil Procedure, there was a 'rule of practice established by long usage' that in actions at law the prevailing party was entitled to costs as of right. Ex parte Peterson, 253 U.S. 300, 317-18, 40 S. Ct. 543, 64 L. Ed. 919 (1920)." (p. 774)

The court then summarized the current practice followed by the Seventh Circuit:

> "Consequently, the language of the rule reasonably bears the intendment that the prevailing party is prima facie entitled to costs and it is incumbent on the losing party to overcome the presumption. Lichter Foundation, Inc. v. Welch, 269 F. 2d 142, 146 (6th Cir. 1959).
>
> This circuit has through the years adhered to this interpretation and has reversed exercises of discretion which go beyond it. Jones v. Schellenberger, 225 F. 2d 784, 794 (7th Cir. 1955), cert. denied, 350 U.S. 989, 76 S. Ct. 476, 100 L. Ed. 855 (1956) ("reprehensible" conduct by the prevailing party triggered the "fullest extent" of discretion against him); Chicago Sugar Co. v. American Sugar Refining Co., 176 F. 2d 1, 11 (7th Cir. 1949), cert. denied, 338 U.S. 948, 70 S. Ct. 486, 94 L. Ed. 584 (1950); United States v. E. J. Biggs Const. Co., 116 F. 2d 768, 775 (7th Cir. 1940). (p. 775)

• • •

> The mere fact that the unsuccessful party was an ordinary party acting in good faith and neither harassing its opponent nor abusing legal process is not sufficient to overcome the presumption that the prevailing party is entitled to costs. There exists another presumption, and that is that parties on both sides of a cause are acting honestly and ethically. That the losing party is in fact what he is presumed to be and is in fact conducting himself as he is expected and required to conduct himself, does not create any equities defeating the presumption that the prevailing party collect the costs due to him 'as of course.' If the awarding of costs could be thwarted every time the unsuccessful party is a normal, average party and not a knave, Rule 54(d) would have little substance remaining.
>
> Nevertheless, the losing party relies upon the *Chicago Sugar Co.* language to the effect that the court may in its discretion require each party to bear its own costs where 'the action was brought in good faith, involving issues as to which the law is in doubt.' *Chicago Sugar Co., supra* at 11. These words were at war with the theory of prevailing-party-default expressed in the remainder of the opinion, relied only upon a 1909 district court opinion, and were immaterial to the result. Inasmuch as virtually every case brought in good faith in some respect involves issues as to which the law is in doubt, if only in regard to the ultimate outcome, a literal interpretation of the language would render Rule 54(d) meaningless.

• • •

> We conclude that the district court abused its discretion in setting aside the taxing of costs by the clerk of the district court (p. 776) . . . The original judgment could have expressly denied costs, whereupon the parties could have briefed and argued that issue and had it determined in the first appeal. However, the original judgment was silent and the presumption was not taken away. We therefore vacate the order granting the motion to set aside and remand with directions to reinstate the costs so awarded in the amount of $13,674.35."

Notwithstanding, the Seventh Circuit's well established and clearly expressed practice with respect to awarding costs to a prevailing party, Judge Swygert without explanation, or justification for a contrary exercise of discretion, granted respondent's motion to set aside costs. (Appendix B) and arbitrarily denied costs to petitioner. (Appendix A, E). This was error and the order of July 31, 1975 should be set aside.

II.

THE ORDER OF THE SEVENTH CIRCUIT IS IN CONFLICT WITH DECISIONS OF THE SUPREME COURT AND OTHER CIRCUITS.

The Circuit Court orders of July 31, 1975 (Appendix C) and September 10, 1975 (Appendix E) do not acknowledge or discuss any of the matters set forth in detail in petitioner's objections to the motion to vacate costs (Appendix D), and the Circuit Court has not at any time made findings to justify overruling the objections and to support entry of its orders vacating and denying costs to petitioner.

In *TransWorld Airlines, Inc.* v. *Hughes,* 515 F. 2d 173 (CA 2, 1975) the Second Circuit rejected as a sufficient recited reason "the court's wise exercise of its discretion" to disallow certain costs when a judgment is reversed (p. 117) saying:

> "While, to be sure, costs are allowable in the exercise of the district court's discretion, that discretion must not be exercised arbitrarily: 'Discretion without a criterion for its exercise is authorization of arbitrariness.' Brown v. Allen, 344 U.S. 443, 496, 73 S. Ct. 397, 441, 97 L. Ed. 469 (1953). The district court sets forth no criterion for the disallowance of this item of costs." (p. 178)

In *Northcross* v. *Board of Education,* 412 U.S. 427, 93 S. Ct. 2201 (1973), the Supreme Court had occasion to consider a situation identical to the case at bar. The Circuit Court had denied costs to the prevailing party without stating reasons for the denial. In a per curiam opinion granting petition for certiorari, and vacating the judgment below insofar as it related to the denial of costs, the court said:

> "In this case, the United States Court of Appeals for the Sixth Circuit denied petitioners' motion for an award of costs and attorneys' fees. The Court of Appeals did not, however, state reasons for the denial and it is therefore not possible for this Court to determine whether the Court of Appeals applied the proper standard in reaching this result."

Similarly, in *Taylor* v. *McKeithen,* 407 U.S. 191, 92 S. Ct. 1980 (1972), the Supreme Court granted certiorari, vacated judgment and remanded to the Circuit Court specifically for an explication of the reasoning of the lower court to support its judgment.

See also *N.L.R.B.* v. *Metropolitan Life Insurance Co.,* 380 U.S. 438, 442-443, 85 S. Ct. 1061, 1064 (1965); *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 167, 83 S. Ct. 239, 245 (1962); *Kelley* v. *Everglades Drainage Dist.,* 319 U.S. 415, 422, 63 S. Ct. 1141, 1145 (1943).

In the case at bar, it is impossible to determine why Judge Swygert departed from established practice and vacated and denied costs to the petitioner, and the justification for this order, if any exists, will remain a mystery unless certiorari is granted.

III.

NO ADEQUATE OR SUFFICIENT REASON EXISTS TO JUSTIFY DENIAL OF COSTS TO PETITIONER.

Respondent suggested three reasons for vacating and denying costs to petitioner, who was the prevailing party on appeal to the Supreme Court (420 U.S. 999, 95 S. Ct. 1440): (A) Plaintiff and the members of the plaintiff class were paupers; (B) plaintiff had originally prevailed in the Seventh Circuit; and (C) on remandment to the District Court, it is unclear who will ultimately prevail. (Appendix B)

Although the Circuit Court did not disclose which of these unsupported suggestions by respondent motivated the order of July 31, 1975 (Appendix C), upon close examination, none of them is adequate or sufficient as a matter of law.

A.

An unsuccessful litigant, whether proceeding in forma pauperis or not, is liable for costs unless good cause exists to order otherwise. Title 28 U.S.C. § 1915(e). Cf. *Duhart* v. *Carlson,* 469 F. 2d 471, 478 (CA 10, 1972), cert. den. 410 U.S. 958, 93 S. Ct. 1431 (1973); *Perkins* v. *Cingliano,* 296 F. 2d 567, 568 (CA 4, 1961).

Moreover, petitioner expressly informed the Court that he was not seeking to recover costs from a pauper. (Appendix D, para. 6, p. D3) Although suit is nominally brought by Sylvia Wilson, in fact, the suit has been maintained as a class action, developed, financed, prosecuted and controlled by the Legal Assistance Foundation of Chicago and East Garfield Legal Services, and the allowable costs are to be paid by that non-prevailing party.

The Legal Assistance Foundation, and its constituent offices, have heretofore, in other litigation, aggressively sought and received substantial costs and attorneys fees from petitioner payable directly to the Foundation as attorney.

For example, on or about March 21, 1975 in *Rodriguez* v. *Trainor,* 69 C 2615, Sheldon Roodman [also attorney for respondent herein] by petition on behalf of the Legal Aid Foundation, attorney for plaintiffs, was awarded $16,925 incurred, inter alia, for court appearances and preparation work in opposition to defendants' Motion for Stay of the Court's order, and motions, briefs and oral argument on appeal before the Seventh Circuit Court of Appeals, and preparation of Brief in Opposition to Petition for Writ of Certiorari before the United States Supreme Court. (See Roodman Affidavit, and Memorandum Opinion included herein in Appendix D, p. D6-16)

On August 12, 1974, petitioner was ordered to pay $1,200 "to the attorney for the plaintiffs, Sheldon Roodman, on behalf of the Legal Assistance Foundation of Chicago."

On November 8, 1973, in *Jeffries* v. *Weaver,* 70 C 3196, petitioner was ordered to pay $225 to the Edwin F. Mandel Legal Aid Clinic.

Judge Swygert, himself, on December 10, 1973, in *United States* v. *Board of School Commissioners of Indianapolis,* No. 72-1948, entered an order of payment of fees directly to the Legal Services Organization. (Appendix D, p. D17) See also, e.g., orders entered February 11, 1975 in *Weisenberger* v. *Huecker,* No. 7299, and on February 19, 1975, in *Milburn* v. *Huecker,* No. 7301B. (Appendix D, p. D18-20)

On information and belief, the Legal Aid Foundation has been allowed costs against petitioner and his predecessors in every case where they as attorneys for plaintiffs have prevailed on the merits.

However, by the July 31, 1975 order of the Seventh Circuit, the Legal Aid Foundation is permitted to evade payment of costs in a case where it is petitioner who has prevailed on the merits, even though those costs may be drawn from the identical fund created by costs heretofore payed by petitioner to the Legal Aid Foundation in other cases.

No reason for such disparity in application of the costs rule has been advanced by either respondent or the court. (Appendix C, E)

It is palpably inequitable and a denial of equal protection to make the Legal Aid Foundation the beneficiary of costs at the expense of petitioner, but deny reciprocal obligation to repay costs when the roles have been reversed because the nominal plaintiff is a pauper, and the controlling role of the Legal Aid Foundation is unrecognized.

B.

The contention that costs should be denied because respondent had originally prevailed before the court which was reversed cannot be seriously intended.

In the first place, it should be noted, that the Seventh Circuit was in fact divided, with a compelling dissent. (499 F. 2d 155, 158) If the respondent had not prevailed in the lower court and had that court not been in error, no appeal and no reversal would have followed, and petitioner would not now be seeking to recover his costs which were necessary to vindicate the rights of the People of the State. It should also be noted that the Supreme Court did in fact ultimately affirm the very position urged by petitioner in both the district court and circuit court.

The time and effort required of petitioner to perfect these rights were not insignificant. In addition to the work required to overcome the obstacles detailed at page 5, supra, the docket fee and cost of printing petitioner's briefs in the Seventh Circuit Court of Appeals was $657.85, as originally ordered by the court. (Appendix A)

The docket fee and cost of printing petitioner's original Petition for Writ of Certiorari in the United States Supreme Court was $832.40, which costs were not recoverable pursuant to Supreme Court Rule 57(3).

By the capricious logic of respondent, petitioner should be denied all costs because he was the appellant and prevailed. Thus, the effect, if not the intent, of the order of July 31, 1975, is to oppress and penalize petitioner for succeeding in reversing the Circuit Court, and thus to chill and inhibit dedicated and effective defense in public policy cases.

C.

The respondent is disingenuous in suggesting that costs should not be awarded to petitioner because it is unclear who the ultimate prevailing party will be.

As provided by rule, petitioner was awarded costs for prevailing on all the issues which were the subject of his appeal. That portion of the case has been completed. On those issues, there is positively no uncertainty as to the prevailing party.

Respondent did not originally suggest that award of costs merely be deferred until completion of the entire case, and the Circuit Court did not so rule. By the July 31, 1975 order of Judge Swygert, petitioner can never recover his appellate costs, regardless of his ultimate success on every remaining issue in the case.

Rule 39(c) F.R.A.P. expressly requires that a party desiring appellate costs to be taxed must do so within 14 days after entry of judgment, and subsection (d) requires those costs to be inserted in the mandate. This was done in the case at bar, until Judge Swygert's inexplicable order.

Thus, respondent has raised no adequate or sufficient reason to support vacating and denying costs to petitioner, and the circuit court has suggested no other findings or reasons to justify its arbitrary, discriminatory and capricious order.

CONCLUSION

Petitioner was the prevailing party on appeal and was awarded costs pursuant to Rule 39 F.R.A.P.

After remand, on an unsupported motion of respondent, Judge Swygert of the Seventh Circuit vacated the portion

of the judgment order awarding costs and summarily denied costs to the petitioner.

The Circuit Court failed to make findings or to assign reasons for its order vacating and denying costs to petitioner.

The respondent failed to suggest adequate or sufficient reasons to justify vacating and denying costs to petitioner.

Neither respondent nor the Circuit Court cited relevant statute, rule or reported case to support the vacating and denial of costs to petitioner.

The order of the Seventh Circuit is in conflict with its own established practice and with decisions of the Supreme Court and other circuits.

The question of equal application of the rule on costs and abuse of discretion is one of fundamental importance in the impartial administration of justice, in this case and all others of like nature, and a definitive ruling is essential to insure justice to petitioner and uniformity of decisions to all.

WHEREFORE petitioner prays that a Writ of Certiorari be granted to review the July 31, 1975 order of the Seventh Circuit Court of Appeal which vacated and denied costs to the petitioner, and that the order of July 31, 1975 be reversed.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
160 North La Salle Street,
Chicago, Illinois 60601,

Attorney for Petitioner.

HERBERT LEE CAPLAN,
Assistant Attorney General,
312/793-3587
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

JAMES L. TRAINOR, Director, Illinois Department of Public Aid,

Petitioner,

vs.

SYLVIA WILSON, individually and on behalf of her unborn child, and on behalf of all others similarly situated,

Respondent.

CERTIFICATE OF SERVICE

I, Herbert Lee Caplan, Assistant Attorney General, a member of the Bar of the Supreme Court of the United States, and counsel for the Petitioner, hereby certify that I have this 28th day of October, 1975, served three copies of the foregoing Petition for Writ of Certiorari upon Lorelei Borland, Garfield-Austin Legal Services, 4 N. Cicero, Chicago, Ill. 60644; Sheldon Roodman, 64 E. Jackson Blvd., 6th Floor, Chicago, Ill. 60604; Bernard Carey, State's Attorney of Cook County, 500 Civic Center, Chicago, Ill. 60602 and Samuel K. Skinner, Acting U.S. Attorney, 219 S. Dearborn, Chicago, Ill. 60604, by depositing same, first class postage prepaid, in the United States mail chute at 160 North LaSalle, Chicago, Illinois. All parties required to be served have been served.

HERBERT LEE CAPLAN

APPENDICES

APPENDIX A

Unpublished Per Curiam Order
UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

On Remand from the Supreme Court of the United States
July 11, 1975

Before

Hon. John S. Hastings, Senior Circuit Judge
Hon. Luther M. Swygert, Circuit Judge
Hon. Wilbur F. Pell, Circuit Judge

SYLVIA WILSON, etc., et al., *Plaintiffs-Appellees,* No. 73-1541, 73-1749 vs. EDWARD T. WEAVER, etc., et al., *Defendants-Appellants.*	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. No. 72 C 1960 Richard B. Austin, Judge.

This cause came on to be heard on remand from the Supreme Court of the United States.

On consideration whereof, we remand this case to the district court with instruction that its judgment be vacated without prejudice to plaintiffs' right to pursue their constitutional claims and any statutory claims not precluded by the Supreme Court's opinion in *Burns* v. *Alcala*, 420 U.S. —— (1975), in accordance with the order of this court entered this date. Costs in these appeals are taxed in favor of the prevailing parties.

APPENDIX B

MOTION TO VACATE JUDGMENT

DATED JULY 11, 1975,

WITH RESPECT TO COSTS

Now come plaintiff-appellees, by their attorneys, and move this Court to vacate the portion of the judgment in the above-captioned case entered on July 11, 1975, related to costs. In support of this motion, plaintiffs-appellees bring to the Court's attention the fact that the named plaintiffs-appellees, Sylvia Wilson and her daughter, are paupers, as well as all other members of the plaintiff class and were granted leave to proceed in forma pauperis by the district court on August 9, 1972. (See Docket Sheet.) The judgment of this Court entered on July 11, 1975, provides that costs in these appeals "are taxed in favor of the prevailing parties." On July 16, 1975, the attorney general's office, as attorney for the appellants, submitted a bill of costs in the amount of $632.85. Plaintiffs-appellees submit that costs should not be awarded against them as paupers. Further, in view of the fact that plaintiffs-appellees originally prevailed in the Court of Appeals in this case, and the fact

that this cause has been remanded for further proceedings and it is unclear who the prevailing parties will ultimately be, plaintiffs-appellees submit that this Court should exercise its discretion and order each party to bear its own costs for the previous appeal.

Respectfully submitted,

SHELDON ROODMAN,
One of the Attorneys for
Plaintiffs-Appellees,
Legal Assistance Foundation
of Chicago,
64 East Jackson Boulevard,
Chicago, Illinois 60604,
922-5625.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
July 31, 1975
Before
Hon. Luther M. Swygert, Circuit Judge

SYLVIA WILSON, etc., et al., *Plaintiffs-Appellees,* No. 73-1541, 73-1749 vs. EDWARD T. WEAVER, etc., et al., *Defendant-Appellants.*	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. (No. 72 C 1960)

This matter comes before the Court on Plaintiffs-appellees' motion to vacate judgment dated July 11, 1975, with respect to costs and defendants-appellants' objection to plaintiffs' motion. On consideration whereof,

IT IS HEREBY ORDERED that plaintiffs-appellees' motion be GRANTED, and that the sentence of the July 11, 1975, order that costs in these appeals in favor of the prevailing parties be and the same is hereby stricken.

This order shall amend the July 11, 1975 order, and it is hereby ordered that each party bear its own costs.

APPENDIX D

MOTION TO VACATE ORDER OF JULY 31, 1975 AND FOR REVIEW BY THE ENTIRE COURT

NOW COME defendants-appellants by WILLIAM J. SCOTT, Attorney General of the State of Illinois, and pursuant to Rules 27(c) and 35 F.R.A.P., file this their motion to vacate the order entered July 31, 1975 and for review by the court, and in support say as follows:

1. The order of July 31, 1975 vacates that portion of the judgment order of July 11, 1975 which awarded costs to the prevailing party on appeal, defendants-appellants.

2. The motion of plaintiffs-appellees to vacate judgment dated July 11, 1975 with respect to costs, filed July 21, 1975, was merely an unsupported suggestion and assigned no error to the court's order of July 11, 1975 nor did it set forth compelling legal or factual reasons to vacate the judgment order and excuse costs in this case, as provided in Rule 39 F.R.A.P. An unsuccessful litigant, whether proceeding in forma pauperis or not, is liable for costs unless good cause exists to order otherwise. Title 28 U.S.C. § 1915(e). Cf. *Duhart* v. *Carlson*, 469 F. 2d 471, 478 (C.A. 10, 1972), cert. den. 410 U.S. 958, 93 S. Ct. 1431 (1973); *Perkins* v. *Cingliano*, 296 F. 2d 567, 568 (C.A. 4, 1961).

3. Defendants-appellants have prevailed on the merits of the issues which were the subject of their appeal.

a) The United States Supreme Court granted defendants-appellants' Petition for Writ of Certiorari and reversed the decision of the Seventh Circuit Court of Appeals. [—— U.S. ——, 95 S. Ct. 1440 (1975)].

b) The original decision of the Seventh Circuit Court of Appeals was itself divided. [499 F. 2d 155, 158 (1974)].

c) The original decision of the District Court was overruled on the precise grounds urged by defendants-appellants in both the District Court and the Circuit Court. [358 F. Supp. 1147 (1972)].

d) The position urged by defendants-appellants in the District Court has been upheld, after prolonged and unrelenting opposition by plaintiffs-appellees throughout every phase of the appeal. [See, e.g., opposition to Stay pending appeal, Brief, filed June 27, 1973 and Motion for Reconsideration, filed July 19, 1973; opposition to Recall and Stay of Mandate pending appeal, Motion filed May 23, 1974 and Response filed June 3, 1974; opposition to Stay of Judgment pending review on Certiorari, Memo filed June 17, 1974, and Motion to Full Court to Vacate Stay, filed June 21, 1974, docketed under A-1212; opposition to Remand to the District Court, Motion filed May 5, 1975.]

4. Defendants-appellants and the People of the State of Illinois have been put to great expense to vindicate their rights, in addition to the time and effort required to overcome the procedural obstructions interposed by plaintiffs-appellees.

a) The docket fee cost of printing appellants' briefs in the Seventh Circuit Court of Appeals was $657.85. (See Cost Bill).

b) The docket fee and cost of printing appellants' Petition for Writ of Certiorari in the United States Supreme Court was $832.40, which was not recoverable pursuant to Supreme Court Rule 57(3).

5. The order of July 31, 1975 does not acknowledge or discuss any of the matters contained in the objections filed by defendants-appellants on July 24, 1975 nor does it

make appropriate findings to overrule the objections of defendants- appellants and to support entry of the order.

6. It should be noted that defendants-appellants are not seeking the recovery of costs from a pauper, Although suit is nominally brought by Sylvia Wilson, in fact, the suit has been maintained as a class action, developed, financed, prosecuted and controlled by the Legal Assistance Foundation of Chicago and East Garfield Legal Services, and the allowable costs should be paid by that non-prevailing party.

a) The Legal Assistance Foundation, and its constituent offices, have heretofore, in other litigation, aggresively sought and received substantial costs and attorneys fees from officers of the State of Illinois payable directly to the Foundation as attorney.

b) On or about March 21, 1975 in *Rodriguez* v. *Trainer*, 69 C 2615, Sheldon Roodman, on behalf of the Legal Aid Foundation, attorney for plaintiffs, petitioned the District Court for the award of $16,925 incurred, inter alia, for court appearances and preparation work in opposition to defendants' Motion for Stay of the Court's Order, and motions, briefs and oral argument on appeal before the Seventh Circuit Court of Appeals, and preparation of Brief in Opposition to Petition for Writ of Certiorari before the United States Supreme Court. (See Roodman Affidavit, and Memorandum Opinion attached hereto as exhibit and incorporated by reference.)

c) On August 12, 1974, in *Rodriguez* v. *Weaver*, 69 C 2615, the Honorable Bernard M. Decker ordered the Director of the Illinois Department of Public Aid to pay $1,200 "to the attorney for the plaintiffs, Sheldon Roodman, [also attorney for plaintiffs-appellees in the case at bar] on behalf of the Legal Assistance Foundation of Chicago."

d) On November 8, 1973, in *Jeffries* v. *Weaver,* 70 C 3196, the Honorable Richard B. Austin ordered the Director and a Supervisor of the Illinois Department of Public Aid to pay $225 to the Edwin F. Mandel Legal Aid Clinic.

e) This court did itself on December 10, 1973, in *United States* v. *School Board Commissioners of Indianapolis,* No. 72-1948, enter an order for payment of fees directly to the Legal Services Organization. (copy attached hereto); see also, e.g., orders entered February 11, 1975 in *Weisenberger* v. *Huecker,* No. 7299 (copy attached hereto) and on February 19, 1975, In *Milburn* v. *Huecker,* No. 7301-B (copy attached hereto).

7. The order entered July 31, 1975 vacating judgment for costs is arbitrary, capricious and discriminatory.

a) The order contains no findings or conclusions to support vacature of the earlier judgment order, and disallowance of costs.

b) On information and belief, the Legal Aid Foundation has been allowed costs against defendants herein by this court in every case where they have prevailed on the merits.

c) The Legal Aid Foundation is now permitted to evade payment of costs in a case where defendants have prevailed on the merits, even though those costs may be drawn from the fund created by costs heretofore payed by defendants to the Legal Aid Foundation in other cases.

d) No reason for such disparity in application of the costs rule is advanced by either plaintiffs-appellees or the court.

e) It is inequitable and a denial of equal protection to make the Legal Aid Foundation the beneficiary of costs at the expense of defendants, but deny reciprocal obligation to repay costs when the roles have been reversed.

f) The order of July 31, 1975 is oppressive and operates to further penalize defendants for prevailing on the appeal, and to chill and inhibit effective defense on public policy issues.

8. The question of costs presented by defendants-appellants in this case is one of fundamental importance in the impartial administration of justice, and a definitive ruling is essential to secure uniformity of decisions within the Seventh Circuit.

WHEREFORE defendants-appellants pray that the order of July 31, 1975 amending the earlier entered order of July 11, 1975 be vacated and held for naught, and the question of costs be reviewed by the entire court.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General of Illinois,
160 North LaSalle Street,
Chicago, Illinois 60601.

HERBERT L. CAPLAN,
Assistant Attorney General,

(Of Counsel),

793-3587

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GLADYS RODRIGUEZ, et al.,

Plaintiffs,

MRS. LORETHA SMITH, et al.,

Plaintiffs-Intervenors,

v.

JAMES L. TRAINOR, Acting Director, Illinois Department of Public Aid, et al.,

Defendants.

No. 69 C 2615

AFFIDAVIT

I SHELDON ROODMAN, under oath, hereby state as follows:

1. I am and have been the principal attorney for the class of plaintiffs in the above case.

2. From May 14, 1971, the date on which plaintiffs originally filed their motion for a rule to show cause, through October 15, 1974, the date on which the Supreme Court of the United States denied the defendants' petition for a writ of certiorari to review the Seventh Circuit decision upholding the $100.00 contempt sanction of this Court, I have

expended the following amount of time in connection with the proceedings necessitated by the contempt of the defendants:

(a) From May 14, 1971, to February 8, 1973 (the date of the hearing and court denial of a stay of its $100.00 contempt order), I spent 108 hours in connection with twenty-two (22) court appearances, four (4) memoranda, and four (4) motions. These memoranda and motion included but were not limited to:

Preparation of Motion for Issuance of Order to Show Cause (May 4, 1971) — Eight (8) hours.

Memorandum in Opposition to Petition to Strike Plaintiffs' Motion for Issuance of Order to Show Cause (June 1, 1971) — Sixteen (16) hours.

Memorandum in Opposition to Defendants' Motion to Vacate the Order of June 16, 1971, and to Present the Issues Therein to the Three-Judge Panel (July 2, 1971) — Six (6) hours.

Memorandum in Support of Motion for Modification and for Civil Contempt (November 15, 1971) — Forty (40) hours.

Memorandum (October 24, 1972)—Six (6) hours.

For the twenty-two court appearances, including preparation time, only thirty-six (36) hours is charged although considerably more time was expended in reviewing month-to-month noncompliance with the court order. Also, no time is allocated for matters unrelated to the contempt of the defendant leading to the $100.00 contempt sanction.

(b) From January 19, 1973, to June 3, 1974, I expended eighty (80) hours in connection with the motions, briefs, and oral argument before the Seventh Circuit in *Rodriguez* v. *Swank*, 496 F. 2d 1110 (7th Cir. 1974).

(c) From August 1974 to October 15, 1974, I expended forty (40) hours in preparing the Brief of the Respondents in Opposition to Petition for Certiorari.

SHELDON ROODMAN.

Subscribed and sworn to before me
this 5th day of November, A.D. 1974.

EDWARD GREENFIELD,

Notary Public.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASERN DIVISION

GLADYS RODRIGUEZ, et al.,

Plaintiffs,

MRS. LORETHA SMITH, et al.,

Plaintiffs-Intervenors,

vs.

JAMES L. TRAINOR, etc., et al..

Defendants.

No. 69 C 2615

MEMORANDUM OPINION

Plaintiffs have moved for an order granting them reasonable attorneys' fees for all proceedings seeking to obtain a civil contempt order designed to bring about compliance with the October, 1970 injuction in this case. Plaintiffs' attorneys have submitted affidavits establishing that a total of 409.5 attorney hours were spent in these proceedings, and contend a reasonable counsel fee amounts to $16,925. Defendants oppose this motion on the grounds that the award of such attorneys' fees is barred by the Eleventh Amendment, and that the facts in this case do not, as a matter of law, justify the award of attorneys' fees.

Defendants rely on *Edelman* v. *Jordan*, 415 U.S. 651 (1974), and *Jordan* v. *Gilligan*, 500 F. 2d 701 (6th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3299 (U.S. Oct. 9, 1974) (No. 74-403), in arguing that such an award is barred by

the Eleventh Amendment. In *Edelman* v. *Jordan*, the Supreme Court held that a federal court may not award compensatory retroactive welfare benefits from a state treasury. But it specifically approved awards which were:

> "the necessary result of compliance with decrees which by their terms were prospective in nature. . . . Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*. . . ." 415 U.S. at 668.

When the instant case was before the Seventh Circuit, *Rodriguez* v. *Swank*, 496 F. 2d 1110 (1974), *cert. denied*, 43 U.S. L.W. 3213 (U.S. Oct. 15, 1974), the court held that the $100 per applicant sanction was within the *Edelman* v. *Jordan* principle of ancillary relief and was therefore not barred by the Eleventh Amendment. Defendants are now seeking to have this court hold that although the remedy fashioned in this case, requiring payments to be made from state funds, is not itself prohibited by the Eleventh Amendment, attorneys' fees, which would be incident to that relief, are so prohibited.

In *Jordan* v. *Gilligan*, the Sixth Circuit declined to follow the Second, Fifth and Ninth Circuits, and held that "the Eleventh Amendment prohibits the awarding of attorneys' fees against unconsenting sovereign states." 500 F. 2d at 709.[1] But *Jordan* v. *Gilligan* stands alone. In *Class* v. *Nor-*

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1. The court drew authority from the Third Circuit opinion in *Skehan* v. *Board of Trustees of Bloomsburg State College*, 501 F. 2d 31 (1974). But as a recent district court opinion in that Circuit noted, *Skehan* concerned a different issue and therefore was not controlling on the issue of attorneys' fees in such a case. That court went on to conclude that the Eleventh Amendment does not bar an order directing individual state officials to pay an award of attorneys' fees out of state funds. *Downs* v. *Dept. of Public Welfare*, 43 U.S.L.W. 2270 (E.D. Pa. Dec. 20, 1974).

ton, 505 F. 2d 123 (1974), the Second Circuit expessly held that an award of attorneys' fees against state officials is not barred by the Eleventh Amendment. *Citing Rodriguez* v. *Swank*, the court found that such an award was within the "ancillary effect" exception of *Edelman* v. *Jordan*, 505 F. 2d at 127. In *Gates* v. *Collier*, 489 F. 2d 298 (1973), the Fifth Circuit held that the award of attorneys' fees in a Section 1983 case payable from the state treasury was not prohibited by the Eleventh Amendment; the Ninth Circuit similarly ruled in *Brandenburger* v. *Thompson*, 494 F. 2d 885 (1974). Even in the Sixth District itself, *Jordan* v. *Gilligan* has fallen into some disrepute. See *Taylor* v. *Perini*, 503 F. 2d 899, 911-12 (6th Cir. 1974) (Edwards, J., dissenting); and *Milburn* v. *Huecker*, 500 F. 2d 1279 (6th Cir. 1974).

This court declines to follow *Jordan* v. *Gilligan* and relies on the cases cited above as well as *Sims* v. *Amos*, 304 F. Supp. 691 (M.D. Ala.) (three-judge court), *aff'd*, 409 U.S. 942 (1972), in holding that such an award of attorneys' fees is not prohibited by the Eleventh Amendment.[2]

Defendants further argue that the award of attorneys fees is not appropriate in this case. Defendants first contend that plaintiffs are not reasonably entitled to attorneys' fees for proceedings in this matter on appeal before the Seventh Circuit and before the Supreme Court of the United States, and submit that plaintiffs should be com-

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2. *Accord*, *Bond* v. *Stanton*, No. 73 H 184 (N.D. Ind., filed Jan. 13, 1975). The Seventh Circuit has, to date, declined to express an opinion on this issue. *See Hairston* v. *R. & R. Apartments*, No. 74-1449 (7th Cir., filed Feb. 19, 1975) (Slip op. p. 4, n. 2).

pensated only for proceedings before the district court. Defendants necessitated such further proceedings, however, by seeking appellate review of this court's order of November 9, 1972. Defendants cannot complain, therefore, that plaintiffs seek compensation for services expended in responding to those actions instituted by defendants themselves. *Cf. Jeanty* v. *McKey & Poague, Inc.*, 496 F. 2d 1119, 1121 (7th Cir. 1974).

Defendants next assert that plaintiffs are not entitled to attorneys' fees because plaintiffs' counsel are employed by the Legal Assistance Foundation of Chicago, a nonprofit organization financed by the Chicago Bar Association, United Charities of Chicago, and the federal Office of Economic Opportunity. The fact that plaintiffs are not obligated to pay the Legal Assistance Foundation for their services is not a bar to an award of attorney fees. All that is required is the existence of an attorney-client relationship. *Hairston* v. *R & R Apartments*, No. 74-1449 (7th Cir., filed Feb. 19, 1975). In this case the litigants furthered the interest of a significant class, persons who are applicants for and potential recipients of welfare assistance under the AFDC program, by effectuating a strong congressional policy expressed in 42 U.S.C. § 601; they have thereby met the test of the "private attorney general" doctrine.

Given the totality of circumstances in this case, this court finds that an award of attorneys' fees is both permissible and appropriate. Accordingly, plaintiffs' motion is hereby granted. Plaintiffs will prepare a suitable judgment order and submit it to this court for entry, after affording notice to defendants.

ENTER:

BERNARD M. DECKER,
United States District Judge.

DATED: March 21, 1975.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHER DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable Bernard M. Decker.

Cause No. 69 C 2615. Date: April 10, 1975.

Title of Cause: *Rodriguez, et al.* v. *Trainor, et al.*

Brief Statement of Motion: Motion for Entry of Order with Respect to the Award of Attorneys' Fees.

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel:

SHELDON ROODMAN
Legal Assistance Foundation of Chicago
64 East Jackson Boulevard
Chicago, Illinois 60604

Representing Plaintiffs

Names and Addresses of other counsel entitled to notice and names of parties they represent:

WILLIAM J. SCOTT, ESQ.
Attorney General
100 North LaSalle
Chicago, Ill. 60602

Attention: George Grumley

BERNARD CAREY, ESQ.
State's Attorney
500 Civic Center
Chicago, Illinois 60602

Attention: Mercer Cook
Represent Defendants.

Enter Judgment Order for attorneys' fees in sum of $16,925.00 for Plaintiffs.

Reserve space below for notations by minute clerk.

(Draft)

DECKER, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GLADYS RODRIGUEZ, et al.,
Plaintiffs,
MRS. LORETHA SMITH, et al.,
Plaintiffs-Intervenors,
JAMES L. TRAINOR, etc., et al.,
Defendants.

No. 69 C 2615

JUDGMENT ORDER

This cause coming on to be heard pursuant to plaintiffs' motion for attorneys' fees with supporting affidavits, and this Court, after considering the memoranda of the parties, having granted the plaintiffs' motion pursuant to the memorandum opinion entered on March 24, 1975, and this Court having considered the (1) time expended by the attorneys in this case based on their affidavits; (2) the novelty and substantial difficulty of the questions involved which were clearly matters of first impression; (3) the considerable skill and expertise required to perform the legal services properly (4) the preclusion of other work by the plaintiffs' attorneys due to the necessity of enforcing the underlying decree in this case and establishing the sanction for civil contempt of the Court's decree; (5) the customary fee for similar legal services in the community; (6) the substantial amounts involved in this case, and the significant results obtained on behalf of thousands of needy families eligible for AFDC; and (7) the experience, reputation,

and demonstrated ability of the lawyers for the plaintiffs in this case, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

1. The defendant James L. Trainor, in his official capacity as Director of the Illinois Department of Public aid, shall pay, or cause to be paid, the sum of $..... as reasonable attorneys' fees to the Legal Assistance Foundation of Chicago for the legal services rendered by the attorneys in this cause on behalf of the members of the plaintiff class.

ENTER:

.....

United States District Court Judge.

DATED: .....

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604

December 10, 1973

Before

Hon. LUTHER M. SWYGERT, Chief Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. (IP 68 C 225) Hon. S. Hugh Dillon, Judge.
No. 72-1948	
vs.	
THE BOARD OF COMMISSIONERS OF THE CITY OF INDIANAPOLIS, et al., *Defendants-Appellants,*	
BARBARA GARDNER, etc., et al., *Intervenors.*	

This matter comes before the Court on intervenors-appellees' reply to defendants-appellants' response to their application for attorneys' fees and costs with supporting memorandum opinion, and on intervenors-appellees' motion for reconsideration. On consideration whereof:

IT IS ORDERED that the portion of this Court's Order dated November 28, 1973 which taxed $2,500.00 in attorneys' feet and $398.72 in costs against defendants-appellants shall stand and not be disturbed.

IT IS FURTHER ORDERED that said orders be clarified so as to award said attorneys' fees and costs to counsel for intervenors-appellees, personally, with subsequent reimbursement by them to the account of Legal Services Organization of Indianapolis, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

MARIANNE WEISENBERGER, et al.,
Plaintiffs,
v.
GAIL S. HUECKER, et al.,
Defendants.

Civil Action
No. 7299-A

JUDGMENT

The Court having entered its findings of fact and conclusions of law,

IT IS ORDERED AND ADJUDGED that the Legal Aid Society recover the sum of $2,000 as attorneys' fees against the defendants, Gail S. Huecker and Daniel R. Tierney, jointly and severally. Said judgment will be paid within 30 days hereinafter and shall bear interest at the rate of 6 percent per annum from the date of judgment until paid. Dated 2-11-75.

CHARLES N. ALLEN,
United States District Judge.

cc: Counsel of Record

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
A LOUISVILLE

ELIZABETH MILBURN, et al.,
Plaintiffs,
v.
GAIL S. HUECKER, et al.,
Defendants.

No. 7301-B

MEMORANDUM AND ORDER

This cause comes before the Court on remand from the United States Court of Appeals for the Sixth Circuit. This Court has been directed to reconsider the denial of costs and attorneys' fees to the Legal Aid Society, counsel for plaintiffs-appellants, and to make findings of fact sufficient to permit meaningful appellate review.

Attention has been directed to *Hall* v. *Cole,* 412 U.S. 1, 93 S. Ct. 1943 (1973), which indicates that such relief may be appropriate where "overriding considerations indicate the need for such recovery".

As to findings of fact, the General Counsel of the Legal Aid Society has filed an affidavit setting forth certain facts relating to the nature of the society, its status, and its financial condition. Item No. 7 in the affidavit, which relates directly to the instant case, states as follows:

> "Although time records were not kept in this case, a reasonable estimate of the amount of time spent on this case by L.A.S. attorneys is 50 hours in the District Court and 30 hours in the Sixth Circuit Court of Appeals."

Finding no affidavit or other proof which contradicts the contents of the General Counsel's affidavit, its contents are adopted as the Court's findings of fact. It is noted, however, that this admitted uncertainty and speculation as to the amount of time spent in the litigation of this case makes the task of equitably awarding attorneys' fees very difficult.

It appears that the Congress has placed a high priority on the prompt processing of applications for welfare benefits. *Goldberg* v. *Kelly,* 397 U.S. 254 (1970). With this in mind, when it becomes necessary to istitute legal proceedings to enforce this Congressional policy and a right of constitutional proportions, one acting to enforce this right is entitled to recover the cost incurred. In those instances in which no costs are actually incurred by the litigants, as in the instant case, attorneys who undertake to represent them should be compensated for their efforts. *Bradley* v. *School Board of the City of Richmond, Virginia,* 53 F.R.D. 28 (E.D. Va., 1971).

WHEREFORE, IT IS ORDERED AND ADJUDGED that the defendants Huecker and Tierney, jointly and severally, pay the sum of $2,500.00 as attorneys' fees to the Legal Aid Society.

RHODES BRATCHER,

United States District Judge.

Entered: February 19, 1975.

August Winkemorra, Jr., Clerk.

Copies to: Counsel of record.

APPENDIX E

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

September 10, 1975

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. JOHN PAUL STEVENS, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. PHILIP W. TONE, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge

SYLVIA WILSON, etc., *Plaintiff-Appellee,* No. 73-1541, 73-1749 vs. EDWARD T. WEAVER, etc., and DAVID L. DANIEL, etc., *Defendants-Appellants.*	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. (72 C 1960)

This matter comes before the Court on the "MOTION TO VACATE ORDER OF JULY 31, 1975 AND FOR REVIEW BY THE ENTIRE COURT," filed herein on Au-

gust 6, 1975 by counsel for the defendants-appellants; and the Circuit Rule 29 citation of additional authority pertaining thereto, filed herein on August 15, 1975 by counsel for the defendants-appellants. Upon consideration whereof, treating said documents as a petition for reconsideration en banc of this Court's order of July 31, 1975, and no judge of this Court having voted to allow such reconsideration.

IT IS ORDERED that the aforesaid motion (and Circuit Rule 29 submission in support thereof) be, and the same is hereby, DENIED.